

NOT DESIGNATED FOR PUBLICATION

No. 109,756

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

DISNIE DAVIS,
Appellee,

and

MARK DAVIS,
Appellant.

MEMORANDUM OPINION

Appeal from Miami District Court; STEVEN C. MONTGOMERY, judge. Opinion filed February 28, 2014. Affirmed.

Marc H. Berry, of Olathe Legal Clinic, LLC, of Olathe, for appellant.

Jeffrey F. Dasenbrock, of Nicholson, Dasenbrock & Hartley, LC, of Paola, for appellee.

Before GREEN, P.J., SCHROEDER, J., and JAMES L. BURGESS, District Judge Retired, assigned.

Per Curiam: Mark Davis appeals the district court's order changing the parenting plan from a shared custodial arrangement to a primary residential custodial arrangement where the children live primarily with Disnie Davis.

FACTS

Disnie Davis, now known as Disnie Marsalis (Mother) and Mark Davis (Father) were married in 1993 and subsequently had four children.

In May 2008, Mother filed a petition for divorce and under temporary orders she and Father were given joint legal custody, with Mother having primary residential custody of the children. A few months later, in July, the district court modified the custody arrangement so that the oldest child was living with Father and the three younger children were living with Mother. In September 2008, the district court again modified the residential custody of the children and determined that Mother should be the sole residential parent.

Under the parties' Marital Settlement and Separation Agreement (Agreement), they agreed that Mother should have residential custody of the children with Father having parenting time. In early July 2009, the district court granted the petition for divorce and incorporated the parties' Agreement into the divorce decree.

In September 2009, the residential placement of the children was temporarily modified so that Father had residential custody of the children. In January 2010, the parties' modified their Agreement so that both parties shared residential custody of the three youngest children.

In November 2011, Mother filed a pro se motion to modify residential custody of the children so that she had primary residential custody. After retaining counsel, Mother filed an additional motion to modify the custodial arrangement.

In September 2012, Father was in a car accident, and the district court temporarily modified residential custody of the children so that Father had parenting time every other weekend while Father was recovering.

In January 2013, an evidentiary hearing was held on Mother's motions to change the custodial arrangement. At the hearing, Mother expressed that she no longer wished to partake in the shared custodial arrangement between the parties.

The district court found the following:

"This Court has long adhered to the position that it will not impose over a parent's objection a shared custodial arrangement. Shared custody requires a maximum amount of communication and cooperation between two parents. Absent the commitment of both parents, a shared custodial is, in this Court's opinion, ultimately doomed to fail. The Court is aware that other Kansas courts, most notably the Third Judicial District, also have adopted this position with respect to shared custodial arrangements. Accordingly, as Mother is no longer agreeable to a shared arrangement, the Court will employ a more traditional primary residential custodial plan."

The guardian ad litem (GAL) recommended the following, which the district court adopted:

"[B.D.], a high school senior, shall continue to reside primarily with Father with Mother's parenting time as agreed by [B.D.]. [F.D.], a high school freshman, has no desire to spend time with Father. He shall continue to reside primarily with Mother with Father's parenting time as agreed by [B.D.] [*sic*]. The arrangement for [B.D.] and [F.D.] are not in dispute. At issue is the arrangement for [W.D.] (a seventh grade student) and [L.D.] (a third grade student.) The GAL recommends that [W.D.] and [L.D.] reside primarily with Mother with liberal parenting time to Father."

The district court noted:

"The two younger children have an extremely close sibling bond with older brother [F.D.], who will continue to reside primarily with Mother. Additionally, while Mother resides within the Paola city limits, Father resides in a rural location requiring a substantial bus ride for the younger children for school transportation. The younger children, as they are becoming older, are more heavily involved in activities outside of school. Father's more remote location complicates the children's involvement in these activities and is inhibiting in that regard. The GAL has correctly observed that the youngest child, [L.D.], is at present least involved in extra-curricular activities. The ultimate consequence of these circumstances is that [L.D.] would often be without companionship at Father's remote residential location."

Father filed a motion asking the district court to reconsider its decision, but the motion was denied.

Father filed a timely notice of appeal.

ANALYSIS

Did the district court abuse its discretion when it modified the parties' shared custodial arrangement?

Father contends that the district court abused its discretion when it failed to find that a material change in circumstances occurred to allow for custody modification, but it went on to modify the residential custody arrangement without such a finding. Father also argues that the district court abused its discretion when it relied on a bright-line rule and changed the custody arrangement solely because Mother no longer wished to participate in the arrangement.

Standard of Review

A district court's modification of an order of custody, residency, visitation, or parenting time was governed by K.S.A. 2010 Supp. 60-1610(a)(2)-(5). An appellate court generally reviews a district court's order granting or denying such modification for an abuse of discretion. See *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 883, 125 P.3d 1081, *rev. denied* 281 Kan. 1378 (2006).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).

An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 331, 277 P.3d 1062 (2012).

Material Change in Circumstances

In its 2010 order modifying the parties' custodial arrangement, the parties agreed and the district court held that the standard to determine whether to modify the parties' custodial arrangement in the future would be whether there was a material change in circumstances.

Under K.S.A. 2010 Supp. 60-1610(a)(2), "[s]ubject to the provisions of the uniform child custody jurisdiction and enforcement act . . . , the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown"

A "material change in circumstances" has never been precisely defined by our courts, but to determine if a material change in circumstances has occurred there must be consideration of a variety of factors and circumstances and the change must be of a substantial and continuing nature as to make the terms of the initial decree unreasonable. *In Re Marriage of Nelson*, 34 Kan. App. 2d at 887. The burden of proving a change in circumstances lies with the party requesting the change. See *In re Marriage of Grippin*, 39 Kan. App. 2d 1029, 1031, 186 P.3d 852 (2008).

Initially, Mother indicated that there was a material change in circumstances because Father remarried and was traveling with the children on the weekends to his wife's home in Platte City, Missouri. In an additional filing, Mother asserted that Father lived primarily in Platte City, Missouri, but rented a house in Paola, Kansas. Father's arrangement—taking the children to and from Platte City, Missouri—created a chaotic and unstable environment for the children. Moreover, Mother complained that the shared custodial arrangement was no longer feasible because the parties could no longer cooperate with each other. Finally, Mother informed the district court that the children would prefer to live with Mother a majority of the time.

While the district court did not use the exact language "material change in circumstances" in its findings and order, the language used gives every indication that it reviewed the change in circumstances, particularly the parties' inability to cooperate under the shared custodial arrangement, in coming to its decision to modify the custody arrangement. Moreover, the GAL informed the district court that the parties rarely communicated. It is hard to conceive how a shared custody arrangement could be possible when the parents rarely communicate with one another.

However, Father provided testimony that he was willing to cooperate and continue the shared custody arrangement. There was no testimony that Father was unwilling or unable to continue with the shared custody arrangement. It appears that the custody

arrangement was being called into question solely because Mother did not wish to participate in the arrangement any longer. It does seem unduly harsh to punish Father merely because Mother wished to discontinue the shared custody arrangement.

If the fact that Mother did not wish to participate in the shared custody arrangement is removed, it appears that the district court's facts to support a finding of a material change in circumstances are limited. Father's home in Paola, Kansas, is further from the school than Mother's home, and the distance may complicate transportation to and from school and the children's various activities, but such a change should not amount to a material change in circumstances.

However, with the parties' inability to communicate with each other and their failure to cooperate in the shared custody arrangement, coupled with Father's distance from the school and the children's activities, it does not appear that the district court's order was arbitrary, fanciful, or unreasonable. Therefore, the district court did not abuse its discretion when it modified the parties' custodial arrangement, giving Mother primary residential custody.

Bright-line Rule

While the district court appears to have heavily relied on the fact that Mother no longer wished to participate in the shared custody arrangement, as indicated above, this fact was not the sole reason for modifying the custody arrangement. Moreover, the district court's reasons for disliking a shared custody arrangement—when both parties are not fully invested in the arrangement—seem logical and reasonable. Furthermore, it does not appear that the district court created a bright-line rule, but merely used this fact as support for one of the factors in coming to its decision.

Affirmed.